Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-87

OCTA R. WHITELEY,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered February 13, 1976.

OPINIONS BELOW

The opinion and summary judgment of the United States Court of Claims is not reported and is set out in the appendix, infra, p. A1. Order denying petitioner's suggestion for rehearing is likewise not reported and is set out in the appendix, p. A4.

JURISDICTION

The judgment of the United States Court of Claims was entered February 13, 1976. Suggestion for rehearing was denied April 23, 1976 (Appendix p. A4). The jurisdiction of this Court rests on 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims is barred from awarding relief to a Department of Agriculture employee even though the Department's failure to conduct required audits and hearings caused misclassification of the employee's position?

2. Whether the Court of Claims should have remanded this case to the Civil Service Commission or the Department for further hearing and findings, because of a denial of due process and arbitrary and capricious action in violation of the Fifth Amendment to the United States Constitution, where a government employee's grievance and appeal were construed by the Department and the Commission as an Equal Employment Opportunity grievance and denied solely on that ground, whereas in fact the grievance encompassed denials of classification reviews?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States.

United States Code, Title 28:

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated

or unliquidated damages in cases not sounding in tort. * * * To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. * * *

United States Code, Title 5:

§ 5112. General authority of the Civil Service Commission

(a) Notwithstanding section 5107 of this title, the Civil Service Commission may—

(1) ascertain currently the facts as to the duties, responsibilities, and qualification requirements of a position;

(2) place in an appropriate class and grade a newly created position or a position coming initially under this chapter;

(3) decide whether a position is in its appropriate class and grade; and

(4) change a position from one class or grade to another class or grade when the facts warrant.

The Commission shall certify to the agency concerned its action under paragraph (2) or (4) of this

subsection. The agency shall act in accordance with the certificate, and the certificate is binding on all administrative, certifying, payroll, disbursing, and accounting officials.

(b) An employee affected or an agency may request at any time that the Commission exercise the authority granted to it by subsection (a) of this section and the Commission shall act on the request.

STATEMENT OF THE CASE

This action by a former employee of the Department of Agriculture (herein "Department") seeks a due process hearing, back pay and other relief due to the failure of the Department and the Civil Service Commission ("CSC") to properly review the employee's request that her position be reclassified. Petitioner was hired May 6, 1957 as a GS-2, promoted to GS-3 August 10, 1958 and to GS-4 October 23, 1966. She served as a General Audit Clerk at that rating until mandatory retirement August 31, 1969.

Starting in 1959, petitioner sought to have her position reclassified. Administrative inaction and resistance which met her attempts extended over ten years. Only a brief summary can be provided in this Petition. April 13, 1959, she wrote the personnel office of the Department stating that her job should be reclassified to GS-4 and asking to be given a hearing if the reclassification was not granted. (CSC* p. 237). She expanded and detailed her position in a letter to Donald Smith of the Department. (CSC p. 239). The

*The record before the Civil Service Commission filed in the Court of Claims is referred to as "CSC p. . .".

Department did not reclassify the position, did not give petitioner a hearing, did not notify her of her right to request an investigation by CSC and did not itself refer the matter to the Commission.

On July 23, 1964, petitioner participated in a Department "Career Counseling" session. At that time she informed the Department's representative that she was doing the work of a GS-5 to GS-7 position. The Department's representative admitted that she was qualified for a GS-4 level and stated that her job would be desk audited. (CSC pp. 132-133). Over seven months later, the same representative, in a "Confidential Memorandum" noted that the desk audit still had not been performed and that she had not been interviewed by the appropriate officials. The memorandum states that the Department's representative had been instructed to tell petitioner that an audit would take place within two weeks. (CSC p. 135). The record does not indicate that any such audit took place. Again there is no indication that the Department informed her of her right to appeal to the CSC nor that the Department referred the matter to the Commission.

Petitioner was promoted to GS-4 October 23, 1966, more than seven years after her initial request and more than two years after the Department's representative found her qualified. She continued to assert her substantive and procedural rights. Two representatives of the Department's personnel office informed her that she should reduce her complaints to writing. (Appendix F to Plaintiff's Response to Defendant's Motion for Summary Judgment [herein "Response"]). On their advice, she wrote the personnel office charging, *inter alia*, that her promotion had been improperly delayed and that she had been denied her right to desk audits and other review procedures. (Appendices E and F

to Response). Nine months later, she was forced to reiterate her complaints and the personnel office then informed her that she would be required to file a "formal written appeal." (CSC p. 114). During the next several months, she telephoned and wrote to a number of Department officials in Washington reiterating her complaints and requesting some reply. (CSC pp. 22, 238).

Despite the fact that petitioner had asked what channels were available *other than* the EEO program (CSC p. 340) and despite the fact that the Department's EEO officer had stated that her complaint should be processed as a classification complaint under DPM Chapter 771 (CSC pp. 345-346), the Department processed Mrs. Whiteley's complaint as an Equal Employment Opportunity charge under DPM Chapter 713. (CSC pp. 279, 337, 342, 347).

Finally, on October 10, 1969, the Department rejected petitioner's complaint and informed her that she could appeal to the CSC. (CSC p. 52). This letter was written over a month after petitioner's mandatory retirement, effectively precluding any possibility of prospective relief.

October 13, 1969, petitioner appealed by letter to the CSC. (CSC p. 338). CSC form letter (CSC p. 337) dated October 20, 1969, indicates the matter was still viewed by CSC as an EEO complaint. October 20, 1969, plaintiff sent a letter to the Board of Appeals and Review clearly reflecting that her complaints involve promotion, classification and equal pay. (CSC p. 319). She included a seventeen (17) page detailing of her grievances. (CSC pp. 320-336). December 1, 1969, the CSC denied her appeal, still improperly viewing it as an EEO complaint. (CSC p. 279).

All of petitioner's grievances and appeals were without legal assistance.

REASONS FOR GRANTING THE WRIT

I. Important Unresolved Question of Federal Law

This case raises substantial questions regarding the effect of *United States* v. *Testan*, ... U.S. .... (1976), 47 L.Ed.2d 114, on the jurisdiction of the Court of Claims and the circumstances under which relief can be granted by that tribunal. The issue is whether an employee who was denied procedural rights to audits and hearings is still barred from seeking relief in the Court of Claims. In *Testan*, this Court held that a federal employee had no claim for damages in the Court of Claims if his position had been misclassified. The Court reasoned that the employee was not left without remedy since he had administrative remedies by which to seek *prospective* relief.

In the present case, the employee was left without remedy. Beginning as early as 1959, she requested that her position be reclassified or that she be given some form of hearing on her complaints. She was never given a hearing. No one in the Department of Agriculture ever informed her that she should file a complaint with the Civil Service Commission, and she was not aware that the Department's personnel officers were not CSC employees. She made her best effort as a layman to utilize the channels which this Court has stated are her only remedy. The Department failed to process her complaints and failed to transmit them to the CSC so that it could exercise its review function under 5 U.S.C. §5112. Instead, the Department's employees promised to handle the grievance within the department through audits which were never conducted

and treated a classification complaint as an Equal Employment Opportunity case. As these illusory departmental avenues were followed, the possibility of meaningful prospective relief diminished. By the time the Department informed her of her right to appeal to the CSC, October 10, 1969, petitioner was past mandatory retirement age.

II. Denial of Due Process Under Fifth Amendment

The binding force and effect of administrative regulations regarding personnel, and the adversely affected employee's right to corrective action (including salary lost) following violation or omissions thereof, were defined by this Court in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), and *Service* v. *Dulles*, 354 U.S. 363 (1957).

The Court of Claims was not faced here with exercising its "power to promote" where the Department declined to do so. The Court was not called upon to substitute its judgment for agency action. Here the Department *failed to act* by denying petitioner prescribed desk audits, position classification procedures and requested hearings on grievances and the CSC failed to properly review on appeal from the Departmental Ruling. Petitioner claims, not a legal right to a promotion, but a legal right to a hearing and determination of damages by denial of hearings.

Petitioner claims that her reclassification claims have been repeatedly raised by her and simply never acted upon. The Department neither rendered nor refused a decision. It did nothing as to these claims because it misconstrued them as EEO claims. The same constitutional defect was perpetuated by the CSC appeal which considered only the EEO claim. The

denial of hearing or ruling on these claims presents the issues of "arbitrary and capricious action" and a denial of procedural and substantive due process to which plaintiff is entitled under the Fifth Amendment to the U. S. Constitution. The lower Court did not rule on this issue.

Wieman v. *Updegraff*, 344 U.S. 183, 192 (1952), held:

> "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary. . . ."

The failure by a governmental agency to follow its own regulations is a denial of procedural due process and arbitrary and capricious. *Morton* v. *Ruiz*, 415 U.S. 199 (1974); *U. S.* v. *Nixon*, 418 U.S. 683 (1974).

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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July 20, 1976.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 266-75

OCTA W. WHITELEY

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

ORDER

(Filed February 13, 1976)

In this civilian pay case plaintiff, a retired employee of the U.S. Department of Agriculture, seeks additional pay for her Government service and added retirement benefits. Plaintiff, in effect, claims that "but for" defendant's failure properly to classify various jobs she held as a Government employee and "but for" defendant's refusal to grant hearings on employment grievances, she would have received additional promotions and would have retired at a higher grade.

Defendant moves for summary judgment contending that plaintiff has failed to state a claim for relief. Upon consideration of defendant's motion and the parties' briefs, the court agrees.

The gravamen of plaintiff's complaint is that due to defendant's conduct we should award a retroactive constructive promotion in this case. The short answer to this is that our power, if any, to grant promotions hinges upon legal entitlement to such a remedy based

upon a statute or regulation. *Skrobot* v. *United States,* Ct.Cl. No. 338-74 (Slip Opin. Dec. 17, 1975); *Peters* v. *United States,* Ct.Cl. No. 470-73 (Slip. Opin. Dec. 17, 1975); *Selman* v. *United States,* 204 Ct.Cl. 675, 686, 498 F.2d 1354, 1359 (1974). Plaintiff's petition is not based upon such a statute or regulation.

More specifically, plaintiff directs her attacks upon defendant's failure to perform desk audits, its neglect to "provide equal pay for equal work," and its refusal to provide hearings on grievance complaints.

Recently in *Skrobot* we held that defendant's failure to conduct desk audits of a position held by a federal employee does not give the employee a *legal right* to a promotion.

> The Agency's failure to comply with the annual review requirements did not grant any legal right to a promotion for plaintiff, nor did it subject the agency to the outlandish liability of allocating vested promotion rights outside the normal competitive merit system to employees whose jobs were merely not reviewed on time. *Skrobot, supra* at 7.

Plaintiff's complaint in the instant case, insofar as it seeks additional compensation based on defendant's failures to audit, cannot be recognized.

We have never adhered to plaintiff's second argument, "equal pay for equal work." We are constrained to follow the maxim that a Federal employee is only entitled to the pay of the position to which he has been appointed. *Peters, supra* at 3; *Desmond* v. *United States,* 201 Ct.Cl. 507, 525-26 (1973); *Bielec* v. *United States,* 197 Ct.Cl. 550, 560, 456 F.2d 690, 696 (1972). Plaintiff does not allege she has ever been denied pay for a position to which she was appointed.

Finally, plaintiff seeks to receive promotions based on defendant's refusal to grant her hearings on the "desk audit" complaints. This goes one step beyond *Skrobot.* However, the principle remains the same. Having concluded that no vested promotion right stems from defendant's alleged failure to audit, it would be equally "outlandish" to find such a promotion right based on defendant's concurrent failure to provide grievance hearings.

To summarize, in the instant case plaintiff bases her suit for backdated promotion and enhanced active service and retirement pay on defendant's alleged failures to conduct audits of her positions, its failure to give "equal pay for equal work," and its refusal to provide a hearing for grievances filed by plaintiff. As we recently held in *Skrobot,* such conduct by the Government does not give rise to a vested promotion right on the part of the employee.

Accordingly, IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted and plaintiff's petition is dismissed.

By the Court

/s/ Wilson Cowen

Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

No. 266-75

OCTA R. WHITELEY

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

ORDER

(Filed April 23, 1976)

This case comes before the court on plaintiff's suggestion for rehearing *en banc* and motion for new trial, or in the alternative for rehearing, amendment of judgment or transfer to appropriate District Court, filed April 2, 1976, pursuant to Rules 7 and 151 and 28 U.S.C. § 1506. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7, which suggestion is denied, and further having been so considered by the panel listed above as to the motion for new trial, or in the alternative for rehearing, amendment of judgment or transfer to appropriate District Court under Rule 151 and 28 U.S.C. § 1506,

IT IS ORDERED that plaintiff's said motion, filed April 2, 1976, be and the same is denied.

By the Court

/s/ Wilson Cowen

Chief Judge

No. 76-67

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OCTOBER TERM, 1976

OCTA R. WHITELEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-87

OCTA R. WHITELEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a retired employee of the United States Department of Agriculture, brought this action in the Court of Claims seeking additional pay for her government service and additional retirement benefits. Petitioner claims that, because the government wrongfully classified various jobs she held and failed to grant hearings on her employment grievances, she was prevented from receiving additional promotions and retirement benefits to which she was entitled. The Court of Claims dismissed the petition on the ground that it failed to state a claim upon which relief could be granted.

1. Petitioner began work at the Department of Agriculture in May 1957, at civil service grade GS-2. She was promoted to GS-3 in August 1958 and to GS-4 in October 1966. In June 1969, the Department notified petitioner that as of August 31, 1969, she was subject to mandatory retirement because of age (CSC 375).[1]

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[1]"CSC" refers to the record before the Civil Service Commission.

Upon receipt of this notification, petitioner responded by questioning the accuracy of the date she had previously given as her birthdate and asserting that there were no records of her date of birth (CSC 373). Subsequently, she complained to an Equal Employment Opportunity counselor that she was being discriminated against because of her age (CSC 345-346). Petitioner thereafter wrote to the Administrator of the Department's Agricultural Stabilization and Conservation Service, enumerating 27 grievances (including allegations of improper discrimination) based on events that allegedly occurred from 1961 through 1968 (CSC 352, 354-371). At the same time, petitioner wrote to the Department's Director of Personnel, requesting a "desk audit of all employees to substantiate further" her various grievances (CSC 353).

In response to the Department's request for clarification of her allegations of discrimination (CSC 347), petitioner wrote that "[t]he discriminations were many, over the long period of time. They include sex, religion, age and political" (CSC 344).

The Department thereafter rejected petitioner's generalized discrimination complaint as untimely (CSC 341).

On petitioner's appeal, the Civil Service Commission affirmed, finding that "your allegation of discrimination based on sex and religion was untimely filed and that your allegation of discrimination in your retirement because of age was not within the purview of the anti-discrimination regulations" (CSC 316). The Commission, in February 1970, denied petitioner's requests to reopen her appeal (CSC 285, 304-305) and advised her that "any further remedies you may have are in the Judicial Branch of the Government" (CSC 285).

Almost five and one-half years later, in July 1975, petitioner instituted this action in the Court of Claims. That court ruled that petitioner's complaint failed to state a claim upon which relief could be granted, and it accordingly granted the government's motion for summary judgment and dismissed the action (Pet. App. A1-A3).

2. The decision of the Court of Claims is correct, and further review is not warranted.

This Court held in *United States* v. *Testan*, 424 U.S. 392, 403, that "Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification." That holding precludes relief on petitioner's complaint in the Court of Claims. As that court correctly stated (Pet. App. A1-A2):

> The gravamen of plaintiff's complaint is that due to defendant's conduct we should award a retroactive constructive promotion in this case. The short answer to this is that our power, if any, to grant promotions hinges upon legal entitlement to such a remedy based upon a statute or regulation. *Skrobot* v. *United States*, Ct. Cl. No. 338-74 (Slip Opin. Dec. 17, 1975); *Peters* v. *United States*, Ct. Cl. No. 470-73 (Slip Opin. Dec. 17, 1975); *Selman* v. *United States*, 204 Ct. Cl. 675, 686, 498 F. 2d 1354, 1359 (1974). Plaintiff's petition is not based upon such a statute or regulation.

The unavailability of relief in the Court of Claims in the nature of "retroactive reclassification resulting in money damages" (*United States* v. *Testan*, *supra*, 424 U.S. at 403) is not affected by the fortuity that petitioner, unlike the complaining parties in *Testan*, has already retired and therefore cannot seek "prospective reclassification" (*ibid.*). Nor can this case be distinguished from *Testan* on the ground that petitioner "claims, not a legal

right to a promotion, but a legal right to a hearing and determination of damages by denial of hearings" (Pet. 8). Even if, as petitioner contends, her due process rights had been violated by the alleged failure to grant hearings on her grievances, that would give her no right to relief in the Court of Claims, because the alleged due process violation cannot " 'in itself * * * fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (*Testan*, *supra*, 424 U.S. at 402). See *Duarte* v. *United States*, 532 F. 2d 850, 852 and n. 3 (C.A. 2).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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[2]An additional ground for dismissal of petitioner's action, not reached by the court below, is the doctrine of laches. This suit was filed in 1975, almost five and one-half years after the Civil Service Commission denied petitioner's requests to reopen the case and informed her that "any further remedies you may have are in the Judicial Branch of the Government" (CSC 285). In an affidavit filed below, the government demonstrated that petitioner's delay caused substantial prejudice to its ability to defend the suit in view of the dimming of memories and retirement of a number of potential government witnesses subsequent to the period of 1959 to 1969 when petitioner's grievances arose (Appendix Q to defendant's motion for summary judgment). The doctrine of laches constitutes an independent ground for dismissal of petitioner's suit. See *Grisham* v. *United States*, 183 Ct. Cl. 657, 392 F. 2d 980; *Gersten* v. *United States*, 176 Ct. Cl. 633, 364 F. 2d 850; *Alpert* v. *United States*, 161 Ct. Cl. 810.

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